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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHN DAVID PALKOVIC, Defendant and Appellant.	D074342 (Super. Ct. No. SCD273174)

APPEAL from a judgment of the Superior Court of San Diego County, Michael S. Groch, Judge. Conditionally reversed and remanded with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted John David Palkovic of attempted murder (Pen. Code, §§ 664, 187, subd. (a); count 1), assault with a semiautomatic firearm (Pen. Code, § 245, subd.

(b); count 2), unlawfully taking and driving a motor vehicle (Veh. Code, § 10851, subd. (a); counts 3, 4), reckless driving while evading police (Veh. Code, § 2800.2, subd. (a); count 5), vandalism (Pen. Code, § 594, subd. (a)(b)(1); count 6), unlawful possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 7), and unlawful possession of ammunition (Pen. Code, § 30305, subd. (b)(1); count 8). It found true firearm enhancements under Penal Code section 12022.5, subdivision (a) as to counts one and two, and as to count one that Palkovic discharged a firearm in committing the crime (Pen. Code,[1] § 12022.53, subdivision (c)).

In bifurcated proceedings, Palkovic admitted he had suffered four prior prison convictions (§§ 667.5, subd. (b), 668), one prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), one violent felony prison prior conviction, and one prior strike conviction (§§ 667, subds. (b)-(i), 668, 1170.12).

The court sentenced Palkovic to a total determinate term of 33 years eight months in prison, including a five-year term for the prior strike conviction.

Palkovic contends: (1) we should remand the case for the trial court to exercise its discretion to grant him mental health diversion under recently enacted section 1001.36, which allows courts to grant pretrial diversion to defendants who suffer from mental disorders and whose mental disorders played a significant role in the charged offense; and (2) on remand, the trial court should exercise its recently granted discretion to strike a prior serious felony enhancement under sections 667, subdivision (a) and 1385,

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1 Undesignated statutory references are to the Penal Code.

subdivision (b). In supplemental briefing, Palkovic contends: (1) we should amend the abstract of judgment because it misidentifies the crimes for which he was convicted in counts 4, 5 and 7; (2) his trial counsel was ineffective for failing to request a mental health diversion hearing under section 1001.36; and (3) under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the fines, fees and assessments the trial court imposed should be struck or stayed because the court made no finding of his ability to pay them.

We conclude the mental health diversion statutes apply retroactively to this case and will exercise our discretion to address this contention. Therefore, we reverse the judgment and remand the matter for the trial court to hold a hearing under section 1001.36 to determine Palkovic's eligibility for diversion. On remand, the court should also exercise its discretion under sections 667, subdivision (a) and 1385, subdivision (b) to either strike or reimpose the five-year prior serious felony enhancement. The People concede and we agree the abstract of judgment should be amended. We decline to strike the fines, fees and assessments because we conclude Palkovic forfeited this claim.

FACTUAL BACKGROUND

Because this appeal presents pure questions of law, we need not discuss in detail the underlying facts of Palkovic's crimes. Suffice to say that in August 2017, while Palkovic was in a stolen vehicle in a parking lot, a man approached him asking for a cigarette. Palkovic pulled a handgun from his waist and pointed it at the man, who ran. Palkovic pursued the man, firing five to seven rounds, but missed him. Two days later, when police observed the stolen vehicle, they contacted Palkovic, but he fled, leading

police on a chase. When the vehicle crashed, Palkovic initially ran, waving a handgun. He later obeyed police orders and dropped the gun. Police arrested him.

In the context of Palkovic's motion to strike a prior strike conviction under *People v. Superior Court* (1996) 13 Cal.4th 497 (*Romero*), Palkovic's treating psychiatrist voluntarily submitted a report seeking a reduced sentence for him. She explained: "[Palkovic] has NEVER been either evaluated or treated for PTSD despite the overwhelming presence of diagnostic criteria and the evidence that patients with severe trauma and PTSD (for which he meets criteria) are highly unlikely (less than 10 [percent]) to maintain recovery without pre- or co-occurring treatment of trauma."

At the July 12, 2018 sentencing hearing, defense counsel argued: "I think that the most powerful thing in [the psychiatrist's] letter is that the last time [Palkovic] was in prison, which was the more recent time, he did get some treatment, and it was that treatment that was—I don't want to say new, but it addressed more of the issues that Mr. Palkovic actually has which is PTSD and trauma. And given just a little bit of treatment, he stayed out of prison for three years, and that's the longest he's been out of prison since [he] was 19 years old, and I think that can show us some really good insight into Mr. Palkovic's future prospects. I think that what that shows is that with continued treatment and doctors who are now understanding rapport building and trauma and how to treat those cases, I think that Mr. Palkovic can be a productive member of society, and I think that he should be given that opportunity."

The court replied: "I agree that the lack of rehabilitation has been a long-standing problem. It's slow to get addressed, but at least I think that a corner is turned on that, as

pointed out by [the psychiatrist]." The court also told Palkovic at sentencing: "I read very carefully [the psychiatrist's] letter and thoughts and took them into consideration, and frankly, I did deviate from what I was originally contemplating; so [the psychiatrist's] efforts and the efforts of your attorney have mitigated your sentence. It still won't sound like a low sentence, but I think [the psychiatrist] saved you about ten years, and so I want you to know that. . . . I see the things that the doctor described and your attorney has argued, and I do have empathy for what you experienced as a young person."

DISCUSSION

I. *Pretrial Diversion for Mental Health*

Palkovic contends section 1001.36 applies retroactively to this case and therefore we should conditionally reverse and remand for the trial court to conduct a hearing to determine his eligibility for pretrial diversion. The People argue Palkovic forfeited the claim by failing to request mental health diversion in the trial court, the statute is not retroactive in any event, and remand would be futile because the trial court would find Palkovic to be a danger to society and thus deny his motion for mental health diversion.

Between Palkovic's conviction and the sentencing hearing, the Legislature enacted sections 1001.35 and 1001.36 (Stats. 2018, ch. 34, § 24), effective June 27, 2018, which authorize pretrial diversion for defendants with mental disorders (mental health diversion statutes).[2] Sections 1001.35 and 1001.36 authorize pretrial diversion for defendants with

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[2] The Legislature subsequently amended section 1001.36, effective January 1, 2019, to eliminate diversion eligibility for defendants charged with certain specified offenses, to give the court the discretion to require defendants to make a prima facie showing of

mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment." (§ 1001.36, subd. (c).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

As a canon of statutory interpretation, we generally presume laws apply prospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*).)

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diversion eligibility, and to give the court the authority to address restitution for victims of diverted offenses. (Stats. 2018, ch. 1005, § 1.) All references to section 1001.36 are to this amended version.

However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid.*)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara*, *supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*Lara*, at p. 308.)

The *Estrada* rule applies to section 1001.36, which lessens punishment by giving defendants the possibility of diversion and then dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) In addition, applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders

to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

The statute's definition of pretrial diversion, which indicates the statute applies at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev. gr.)

Furthermore, we note the California Supreme Court decided *Lara* before the Legislature enacted section 1001.36 and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat section 1001.36 in a different manner, we would expect the Legislature to have expressed this intent clearly and directly, not obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude section 1001.36 applies retroactively to this case.

A defendant may forfeit a right in a criminal case by failing to timely assert the right before the tribunal with jurisdiction to determine it. (*People v. Trujillo* (2015) 60

Cal.4th 850, 856.) "However, neither forfeiture nor application of the forfeiture rule is automatic. [Citation.] Competing concerns may cause an appellate court to conclude that an objection has not been forfeited. [Citations.] Similar concerns may also cause an appellate court to refrain from applying the forfeiture bar." (*People v. McCullough* (2013) 56 Cal.4th 589, 593.) Even if forfeited, we exercise our discretion to address this claim on the merits in the interest of judicial economy, as we will remand the matter on another ground as discussed below. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

The mental health diversion statutes were enacted and took effect on the same day, which was two weeks before Palkovic's sentencing. At the sentencing hearing, defense counsel argued for a disposition that would take into account Palkovic's need for mental health treatment. However, neither defense counsel in closing arguments nor the court in its sentencing decision referenced the mental health diversion statutes. The prosecutor also did not reference them in countering defense counsel's arguments.

Given the similarities between the relief sought by defense counsel and the relief provided by the mental health diversion statutes, it is difficult to conclude Palkovic relinquished his right to seek the relief provided by the statutes. Rather, we may reasonably infer from the omission of any reference to the statutes at the sentencing hearing that neither counsel nor the court was aware of them at the time. Courts generally decline to apply the forfeiture rule to a right derived from recent, unanticipated changes to the law. (See *People v. Edwards* (2013) 57 Cal.4th 658, 704-705; *People v.*

Black (2007) 41 Cal.4th 799, 810; *People v. Turner* (1990) 50 Cal.3d 668, 703.) We decline to do so here.

The People contend remanding the case to allow the court to exercise its discretion under the mental health diversion statutes would be futile because the court would inevitably find Palkovic poses an unreasonable risk of danger to public safety.

We find this contention unpersuasive because the purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2 [the prima facie showing provision authorizes a court to request a prima facie hearing where defendants must show they are potentially eligible for diversion].) Whether the court will be satisfied that treating Palkovic in the community will not pose an unreasonable risk of danger to public safety is unanswerable until Palkovic has had an opportunity to develop the requisite expert evidence. Further, the court has not had an opportunity to consider whether he would be an appropriate candidate for mental health diversion. Our remand will provide both Palkovic and the court these opportunities.

The People also contend that Palkovic is statutorily ineligible for mental health diversion because he suffered a prior strike conviction, which the court declined to strike. They point out too that section 667, subdivision (c)(2) prohibits a defendant with a prior strike from receiving a suspended sentence. This court addressed this issue in *People v. Burns* (2019) 38 Cal.App.5th 776, 789, review granted October 30, 2019, S257738, which we cite for its persuasive value (Cal. Rules of Court, Rule 8.1115(e)(1)). We

reasoned: "[T]he People misconstrue the conditional reversal procedure in *Frahs*[*, supra,* 27 Cal.App.5th 784, rev. gr]. . . . The *Frahs* procedure conditionally reverses both the convictions and the sentence for an eligibility hearing under section 1001.36. [Citation.] Conditional reversal thus restores the case to its procedural posture before the jury verdict for purposes of evaluating [appellant's] eligibility for pretrial mental health diversion. At that point, [appellant] faced a mere allegation of a prior strike, which was insufficient to preclude a suspended sentence or diversion." The same applies here. Moreover, as we proceed to discuss, the court will have an opportunity to exercise its discretion to decide whether to strike Palkovic's prior strike.

II. *Senate Bill No. 1393*

The People concede and we agree this matter should be remanded to allow the trial court to exercise discretion newly granted it by Senate Bill No. 1393 to strike his serious felony prior conviction used to support the five-year enhancement under section 667, subdivision (a)(1). Before Senate Bill No.1393's adoption, the law prohibited courts from striking felony priors used for purposes of the section 667 enhancement. (Former § 1385, subd. (b).) However, effective January 1, 2019, Senate Bill No. 1393 removed that prohibition. Palkovic contends Senate Bill No. 1393 is retroactive and applies to all cases not yet final as of its effective date, such as this case.

Absent evidence to the contrary, statutory amendments that reduce the punishment for a crime or vest in trial courts the discretion to impose a lesser penalty, such as Senate Bill No. 1393, apply to all defendants whose judgments are not final as of the amendment's effective date. (*Estrada, supra,* 63 Cal.2d 740, 742; *People v. Garcia*

(2018) 28 Cal.App.5th 961, 972.) When it enacted Senate Bill No. 1393, the Legislature did not indicate it intended the legislation to apply prospectively only. (*Garcia*, at p. 972.) The act thus applies retroactively to this case.

We are required to remand in instances such as this "unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement" even if it had such discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) The record here contains no such "clear" indication. We thus remand for the court to consider striking the serious felony prior conviction that supports the enhancement imposed under section 667, subdivision (a)(1).

III. *Imposition of Fines, Fees, and Assessments*

At sentencing, the trial court imposed a court operations assessment of $320 (Pen. Code, § 1465.8, subd. (a)(1)), a court facilities assessment of $240 (Gov. Code, § 70373), a $2,000 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a $2000 parole revocation fine (Pen. Code, § 1202.45). The court stayed the latter fine.

Palkovic for the first time on appeal challenges the court's imposition of those fines and assessments based on his inability to pay relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157.

In *Dueñas*, the defendant at sentencing objected on due process grounds to the trial court's imposition of a $30 court facilities assessment (Gov. Code, § 70373), a $40 court operations assessment (Pen. Code, § 1465.8), and a statutory minimum $150 restitution fine (Pen. Code, § 1202.4, subd. (b)(1)). (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1162.)

The defendant in *Dueñas* was a probationer who suffered from cerebral palsy, was indigent, homeless, and the mother of young children. The court agreed to, and held, a separate inability to pay hearing as requested by the defendant. (*Id*. at p. 1161.)

The trial court at that hearing considered the defendant's "uncontested declaration concerning her financial circumstances, determined that she lacked the ability to pay the previously-ordered attorney fees, and waived them on the basis of her indigence. The court concluded that the $30 court facilities assessment under Government Code section 70373 and $40 court operations assessment under Penal Code section 1465.8 were both mandatory regardless of [her] inability to pay them" (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163), and that she failed to show " 'compelling and extraordinary reasons' required by statute (Pen. Code, § 1202.4, subd. (c)) to justify waiving [the $150] fine. The trial court rejected *Dueñas*'s constitutional arguments that due process and equal protection required the court to consider her ability to pay these fines and assessments . . . ." (*Dueñas*, at p. 1163.)

In reversing, the *Dueñas* court concluded that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373" (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164); and that, "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must

be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

The application of *Dueñas* has been addressed in several recent cases.[3] In *People v. Castellano* (2019) 33 Cal.App.5th 485, the same division of the Second Appellate District that decided *Dueñas* applied its holding to a defendant who had been assessed various court fees and the statutory minimum restitution fine. (*Castellano*, at pp. 488-489.) In doing so, the court explained that a defendant must "in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Id.* at p. 490.) It held, however, that the defendant's failure to object to the fine and fees before *Dueñas, supra*, 30 Cal.App.5th 1157 was decided was not a forfeiture of the issue because *Dueñas* was "a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial." (*Castellano*, at p. 489.) More recently in *People v. Johnson* (2019) 35 Cal.App.5th 134, the court agreed with *Castellano* on the forfeiture issue, commenting "we are hard pressed to say [the *Dueñas*] holding was predictable and should have been anticipated." (*Johnson*, at p. 138, fn. omitted.)

In *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, this court concluded the appellant's challenge to the fees and fines was forfeited in part because "even before

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[3] Because we resolve this issue on forfeiture grounds, we express no opinion on whether *Dueñas* was correctly decided.

Dueñas[, *supra*, 30 Cal.App.5th 1157] a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay because governing law as reflected in the statute (§ 1202.4, subd. (c)) expressly permitted such a challenge." (*Gutierrez, at p.* 1033.) Applying that reasoning, we conclude that as Palkovic's fines exceeded the statutory minimum, he had every incentive to object to them. We also stated in *Gutierrez,* "As a practical matter, if Gutierrez chose not to object to a $10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional $ 1,300 in fees." (*Ibid.*) The same applies here. As Palkovic did not object to the $2,000 restitution fine on inability to pay grounds, he would not complain on similar grounds to the much lower amount of fines and fees imposed. We conclude Palkovic's challenge to the fees, fines and assessments is forfeited.

DISPOSITION

The judgment is conditionally reversed. The case is remanded to the superior court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines that Palkovic qualifies for diversion, the court may exercise its discretion to grant diversion, and if Palkovic successfully completes diversion, the court shall dismiss the charges.

If the court determines that Palkovic is ineligible for diversion or that Palkovic is not an appropriate candidate for diversion despite qualifying under the statute, or if the court places Palkovic on diversion but he fails to successfully complete diversion, then the court shall reinstate Palkovic's convictions and conduct further sentencing proceedings as appropriate. At any resentencing, the trial court shall exercise its discretion with respect to whether to strike or reimpose the five-year prior serious felony enhancement, and amend the abstract of judgment to accurately reflect Palkovic's convictions.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.